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NO. 45401-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

JAIME SILVA ARROYO
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Sally F. Olsen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed prejudicial misconduct by shifting the burden of proof to the defense.

2. The prosecutor committed prejudicial misconduct by appealing to the passions and prejudice of the jury.

3. The trial court imposed sentencing conditions that are not crime related.

Issues Presented on Appeal

1. Did the prosecutor commit prejudicial misconduct by informing the jury that if the defendant was not guilty he would have offered an explanation?

2. D the prosecutor commit prejudicial misconduct by arguing to the jury that this case was a woman's "worst nightmare"?

3. Did the trial court impose sentencing conditions that are not crime related by prohibiting contact with minors and prohibiting a consensual relationship without permission from the CCO?

B. STATEMENT OF THE CASE

Jaime Silva Arroyo was charged and convicted by a jury of attempted rape in the second degree. CP 107-108. The trial court

imposed community custody conditions related to minors and consensual adult relationships. CP 94-104.

a. Prosecutor Closing.

During closing argument, the prosecutor argued as followed:

> Again, this scenario is every woman's worst nightmare. It really is. And what this scenario represents is an attack by a stranger. RP

RP 406.

During rebuttal closing, the prosecutor argued that the defendant had the burden to prove reasonable doubt. 432-433.

> The defense is giving you a lot of reasons. He is giving you a lot of explanations. And, you know, that is all to the good, but what he hasn't provided is reasonable doubt.

RP 432-433.

b. Trial Facts

Sabrina McNulty observed a man in Safeway. RP 330. When she went to Rite Aid after shopping at Safeway, she saw the man again. RP 331. When she left Rite Aid, the man tried to talk to her, but she did not understand him. The man pulled out his wallet and rifled through it in front of her and then grabbed her arm and knocked her to the ground. RP 332-333. McNulty struggled and yelled 'fire". RP 338.

Office Johnson interviewed Ms. McNulty and noticed scratches on her neck, a swollen lip and bruises. RP 153.

Johnson found a cap near the site of the attack that contained Silva Arroyo's DNA. RP134, 144, 154. McNulty testified that her attacker wore the baseball cap which was later determined to contain Silva Arroyo's DNA. RP 3340-341. Silva Arroyo testified that he did not wear his hat to the Safeway and did not encounter McNulty. RP 368-369, 371.

Silva Arroyo was cooperative and testified that he uses the footpath where the incident occurred to travel to his brother's apartment. RP 30, 365. McNulty described the man as 5'7" to 5"8' weighing 180 pounds and wearing jeans, tennis shoes, a hoody and a red and black baseball cap and identified Silva Arroyo as her attacker. RP 33, 350. Silva Arroyo is 5' 3" and weighs 140 pounds. RP 303. The man who attacked McNulty tried to get her pants down but did not grab her intimate parts and did not remove his pants. RP 343, 346-347.

1. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY APPEALING TO THE PASSIONS AND PREJUDICES OF THE JURY AND BY SHIFTING THE BURDEN OF PROOF TO THE DEFENSE.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch,* 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, *State v. Thorgerson,* 172 Wn.2d 438, 448, 258 P.3d 43 (2011), a prosecutor must "seek convictions based only on probative evidence and sound reason," *State v. Casteneda–Perez,* 61 Wn.App. 354, 363, 810 P.2d 74 (1991); *State v. Huson,* 73 Wn.2d 660, 663, 440 P.2d 192 (1968). "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." American Bar Association, Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980); *State v.*

Brett, 126 Wn.2d 136, 179, 892 P.2d 29 (1995); *State v. Belgarde,* 110 Wn.2d 504, 755 P.2d 174 (1988).

To prevail on a claim of prosecutorial misconduct, a defendant must show the prosecutor's conduct was both improper and prejudicial. *Thorgerson,* 172 Wn.2d at 442. To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.; State v. Ish,* 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal,* 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Because Silva Arroyo objected at trial, he need not establish that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Thorgerson,* 172 Wn.2d at 443; *State v. Russell,* 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

a. Passions and Prejudice

Prosecutors may not seek a verdict by appealing to the passions or prejudice of the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); *Belgarde*, 110 Wn.2d at 507; State v. Powell, 62 Wn.App. 914, 816 P.2d 86 (1991). A prosecutor commits misconduct when he appeals to jurors fears of criminal groups. *State v. Perez-Mejia*, 134 Wn.App. 907, 916, 143 P.3d. 838 (2006).

In *Powell*, the prosecutor committed prejudicial misconduct by telling the jury that if they found the defendant not guilty they would in essence be telling all children of sexual abuse that they would not be believed when reporting the abuse and "declaring open season on children." *Powell*, 62 Wn.App. at 918. The Court reversed finding the argument designed to appeal to the passions and prejudices of the jury, rather than based on the evidence presented. *Powell*, 62 Wn.App. at 919.

In *Perez-Meija*, the court reversed finding prejudicial misconduct during closing when the prosecutor alluded to the defendant's ethnicity, gang membership and gang behavior to appeal to the passions and prejudice of the jury, rather than requiring an evaluation of the evidence presented. *Perez-Mejia*, 134 Wn.App. at 915-918.

Similarly in *Belgarde*, the prosecutor tried to scare the jury by referring to the defendant's association with the American Indian Movement as a group of "a deadly group of madmen" and "butchers" *Belgarde,* 110 Wn.2d at 507. The Supreme Court explained that it would not permit a prosecutor to use argument to scare jurors into believing that the defendant was dangerous by virtue of his

association in a group. *Belgarde,* 110 Wn.2d at 508. The prosecutor's argument not only was designed to scare the jurors, but it was done by impermissibly asking the jury to consider matters not relevant to the case at hand to specifically instill fear. Id.

Here the prosecutor's argument that "this scenario is every woman's worst nightmare" was designed to scare the jurors into considering the possibility of rapists running free, rather than requiring the jury to examine and evaluate the evidence presented for proof beyond a reasonable doubt. This tactic was identical in nature to "declaring open season on children" (*Powell*, 62 Wn.App. at 918) and the impermissible reference to "a deadly group of madmen" and "butchers." *Belgarde*, 110 Wn.2d at 110. It served no other purpose than to scare the jurors into deciding the case based on their own personal fears rather than on the facts of the case. RP 406. Here the defense objected to the improper conduct, but even if he had not this is one of those cases like *Powell* and *Belgarde* where "[t]he bell once rung cannot be unrung" Powell, 62 Wn.App. at 919.

b. Shifting Burden of Proof

A prosecutor commits misconduct by misstating the law regarding the burden of proof. *State v. Fleming*, 83 Wn.App. 209,

213-14, 921 P.2d 1076 (1996), *reviewed denied*, 131 Wn.2d 1018 (1997*); In re Winship*, 397 U.S. 358, 361-362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A prosecutor commits misconduct by implying the defense bears the burden to present evidence of innocence. *Fleming*, 83 Wn.App. at 213-214. In *Fleming*, the prosecutor argued that to acquit the defendant it had to find that the victim was lying. *Fleming*, 83 Wn.App at 213. The Court held this argument misstated the law and impermissibly shifted the burden of proof to the defense rather than the correct burden which required acquittal if the jury did not have an abiding belief that the state proved all of the elements of the crime charged. Id.

The prosecutor also argued that if there was any evidence that the victim lied, the defense would have presented it and because the defense did not argue the victim lied, there was no proof that she lied, implying that the defendant had failed to prove his innocence. *Fleming*, 83 Wn.App at 214. "Misstating the basis on which a jury can acquit may insidiously lead, as it did here, to burden shifting". *Flemming*, 83 Wn.App. at 214.

Here as in *Flemming*, the prosecutor implied that the defense bore the burden of proving reasonable doubt when it argued:

> The defense is giving you a lot of reasons. He is giving you a lot of explanations. And, you know, that is all to the good, but what he hasn't provided is reasonable doubt.

RP 432-433. This misstated the basis for acquittal and "insidiously" shifted the burden of proof to the defense to prove reasonable doubt. This argument is the same as the improper argument in *Fleming* where the prosecutor told the jury that if there was reasonable doubt, the defense would have established it, implying that the defense failure to prove reasonable doubt was a basis for conviction. *Flemming*, 83 Wn.App. at 214. Here the argument that "he hasn't provided" reasonable doubt shifted the burden to the defense in the same manner held impermissible in *Fleming*, and contrary to the due process requirement that the state, not the defense prove each essential element of the crime charged. *Winship*, 397 U.S. at 361-362.

Here defense objected to the misconduct, thus unlike in the cases cited herein, the defense need establish flagrant and ill-intentioned misconduct. However, in *Fleming*, despite the lack of objection, the court held the misconduct rose to the level of constitutional error. The facts of this case are more egregious than in

Flemming, because the trial court was given the opportunity to minimize the misconduct, but chose not to which tacitly informed the jury that it could consider the improper misstatement of law - shifting the burden of proof to the defense. This was prejudicial misconduct of constitutional magnitude similar to that in *Fleming* which requires reversal because the state was relieved of its burden of proof.

2. THE COMMUNITY CUSTODY CONDITIONS ARE NOT CRIME RELATED AND INFRINGE ON DEFENDANT'S CONSTITUTIONAL RIGHTS TO FREE SPEECH.

Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and may impose others. RCW 9.94A.505; *State v. Warren,* 165 Wn.2d 17, 32, 195 P.3d 940 (2008). In Silva Arroyo's case the trial court's sentencing prohibitions against having a romantic relationship without permission from his CCO or entering adult book stores, using 900 numbers, and not frequenting places where minors congregate are not crime related. "RCW 9.94A.030; Section 4.2 of the Judgment and Sentence contains non-crime-related conditions of community custody in violation of RCW 9.94A.030(10) which defines crime-related as follows:

> (10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

Id.

The standard of review for a trial court's imposition of crime-related prohibitions that interfere with a fundamental constitutional right is a heightened abuse of discretion standard that requires sentencing conditions be "sensitively imposed" so that they are "reasonably necessary to accomplish the essential needs of the State and public order." *State v. Rainey*, 168 Wn.2d 367, 374-75. 229 P.3d 686 (2010). This Court will reverse where the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley,* 121 Wn.2d.2d 22, 37, 846 P.2d 1365 (1993); *State v. Cunningham,* 96 Wn.2d.2d 31, 34, 633 P.2d 886 (1981).

a. No Contact with Minors

Preventing Arroyo Silva from having contact with minors and all of the conditions related to minors are not-crime-related, are not "reasonably necessary to accomplish the essential needs of the State

and public order", and implicate fundamental first amendment rights guaranteed by Const. art. I, § 5 and the First Amendment. *Rainey*, 168 Wn.2d at 374-75.

In *State v. Riles,* the court held that an order prohibiting one of the two defendants from having contact with minors was questionably overbroad where the defendant was convicted of raping an adult. *State v. Riles,* 135 Wn.2d. 2d 326, 352, 957 P. 2d 655 (1998), *Abrogated on other grounds in State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010). The court held, "There is no reasonable relationship between his offense and the provision for no contact with minors. *There* is nothing in the record to indicate he is a danger to children now or predictably would be upon his release from prison earlier or in thirty or forty years." *Id.*

Here, as in *Riles*, Silva Arroyo's attempted rape charge was directed at an adult crime. As in *Riles*, there is no reasonable relationship between prohibiting contact with minors and the crime committed. The lack of a reasonable relationship between the offense and the provision for no contact with minors violates RCW 9.94A.030(13) and is an abuse of discretion under the heightened standard which must be stricken. *Rainey*, 168 Wn.2d at 374-75

b. No Consensual Relationships.

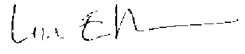
Similar to the prohibition against contact with minors, the prohibition against consensual relationships with adults is also not crime related as required under RCW 9.94A.030(10). This was a stranger attack, not an attempted rape within the context of a relationship. As such, the condition prohibiting consensual relationships without CCO approval is not authorized by statute and therefore must be stricken.

D. CONCLUSION

Mr. Silva Arroyo was denied his right to a fair trial by prosecutorial misconduct and the sentencing conditions are not crime related. Mr. Silva Arroyo, respectfully requests this Court reverse the conviction and remand for a new trial and new sentence.

DATED this 20th day of March 2014.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County prosecutor's kcpa@co.kitsap.wa.us and Jaime Silva Arroyo 8 Coyote Ridge Corrections Center DOC# 367269 Post Office Box 769 Connell, WA 99326-0769 a true copy of the document to which this certificate is affixed, on March 21, 2014 and April 18, 2014. Service was made to Mr. Silva Arroyo by depositing in the mails of the United States of America, properly stamped and addressed and electronically to the prosecutor.

Lise Ellner

Signature

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Comments:

Counsel sent appellant the opening brief on March 21, 2014 and April 17, 2014

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